

No. 83-717

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DEC 14 1983
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In the Supreme Court of the United States

OCTOBER TERM, 1983

ALLEN C. MORROW AND SARAH F. MORROW, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

REX E. LEE
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Petitioners contend that the evidence was insufficient to support their convictions for conspiracy to commit a felony by the use of an "explosive", as that term was defined in 18 U.S.C. 844(j) prior to its amendment by the Anti-Arson Act of 1982 (Pub. No. 97-298, § 2, 96 Stat. 1319).

1. Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted on one count of conspiring to use an explosive to commit mail fraud, in violation of 18 U.S.C. 371, 844 and 1341, and several substantive mail fraud counts, in violation of 18 U.S.C. 1341.¹ Petitioner Allen Morrow was sentenced to six years' imprisonment and fined \$18,000. Petitioner Sarah Morrow was sentenced to six months' imprisonment, to be followed by three years' probation, and fined \$10,000.

¹ Petitioners raise no challenge to their convictions on the mail fraud counts.

The evidence adduced at trial showed that petitioners, owners of an adult bookstore in Johnstown, Pennsylvania, conspired to destroy the bookstore in order to collect the proceeds of five insurance policies they held covering the property. The actual destruction of the bookstore was accomplished by Franklin Kiefer, Donald Bonsal, and Frank Cislo. Kiefer and Bonsal bought 20 gallons of kerosene, which they brought to the bookstore secreted in cardboard boxes. Kiefer, Bonsal, and Cislo then drilled holes in the walls of the bookstore building in order to create a draft, spread some papers, and left the building. Later that evening, Bonsal returned to the bookstore and poured kerosene in several large puddles, soaking the papers and other combustible materials on each of the three floors of the building. Bonsal connected these puddles with trails of kerosene. As he left the building, Bonsal ignited the kerosene, setting the building ablaze. Pet. App. A4.

Warren Parker, an expert on explosives and incendiary devices employed by the Bureau of Alcohol, Tobacco and Firearms, testified that, in his opinion, the entire building filled with combustible materials, fuel oil, and kerosene-soaked papers, combined with draft holes and trails of kerosene between piles of combustible materials, constituted an incendiary device and, therefore, an explosive under federal law. Pet. App. A4, A16-A20.

2. Petitioners contend (Pet. 5) that this Court should resolve the conflict of authority among the circuits concerning the construction of the term "explosive," as used in 18 U.S.C. 844 prior to the amendment of that statute by the Anti-Arson Act of 1982. As recently as November 28, 1983,

this Court denied a petition for a writ of certiorari presenting substantially the same claim. *Xheka v. United States*, No. 83-338.² There is no reason for a different result here.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

²We have served a copy of our brief in opposition in *Xheka* on counsel for petitioners.

³Petitioners suggest (Pet. 5-6) that the court of appeals erroneously relied on the Anti-Arson Act in construing the pre-amendment law. As the court of appeals' opinion makes clear, however, that court based its affirmance of petitioners' convictions on the pre-amendment case law (see Pet. App. A6-A9), merely noting (*id.* at A7-A8 n.5 (emphasis added)) that it "agree[d] too" with the Seventh Circuit's observation in *United States v. Xheka*, 704 F.2d 974, 979 n.2 (1983), cert. denied, No. 83-338 (Nov. 28, 1983), that the Anti-Arson Act "does not necessarily implicate a change in scope as much as a clarification of the original meaning of that section."